Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the	)	MM Docket No. 92-259
Cable Television Consumer	)	
Protection and Competition	)	
Act of 1992	)	
	)	
Broadcast Signal Carriage Issues	)	

REPLY COMMENTS OF THE COMMUNITY ANTENNA TELEVISION ASSOCIATION, INC.

Community Antenna Television
Association, Inc.
3950 Chain Bridge Road
P.O. Box 1005
Fairfax, VA 22030-1005
703/691-8875

January 19, 1993

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-259
	)	
Broadcast Signal Carriage Issues	)	

REPLY COMMENTS OF THE COMMUNITY ANTENNA TELEVISION ASSOCIATION, INC.

The Community Antenna Television Association, Inc., ("CATA"), is a trade association representing owners and operators of cable television systems serving approximately 80 percent of the nation's more than 60 million cable television subscribers. CATA filed "Comments" in this proceeding and files these Reply Comments on behalf of its members who will be directly affected by the Commission's action.

Thankfully for both the Commission and the filing parties, reply comments in this proceeding need not be excessively long. Everyone took their anticipated political positions. Cable operators, including CATA, seek maximum flexibility in order to make some sense out of the rules and allow their business to continue to be conducted with the minimum dislocation to themselves and their subscribers. Broadcasters seek to maximize their leverage in either forcing access and channel positioning on the largest number of cable systems they can or extracting payment in some form for carriage of their signals.

In the case of the broadcasters, if the focus is on "must

carry," then the preferred rationale is "localism." If the focus is on "retransmission consent," then the public policy rationale flexibly changes to one of "fairness in the marketplace."

Interestingly, while almost all cable commenters start with the premise that the rules, and particularly the "must carry" rules, will be found to be unconstitutional, as they have been twice in the past, there is little if any extensive constitutional analysis. The issue is already in court, and the Commission is not in a position to rule on that issue at this juncture.

Incredibly, one party, the Association of Public Television Stations ("APTS"), in its almost insulting filing alleging that there is a "...substantive likelihood that broad discretion [by cable operators regarding certain implementation decisions] will be abused.", supported that contention later in its comments by suggesting that cable operators are "...openly antagonistic to the basic intent and purpose of the must carry provisions" because the operators have challenged the constitutional basis of the rules in court! We are disturbed at the notion put forward by APTS that defending our constitutional rights should somehow justify a negative governmental judgment regarding the intent of the cable industry to deliver broadcast signals to the public. As the Commission's own studies amply show, the vast majority of broadcast stations, including the seemingly "holier than thou" public broadcasters, are in fact carried on virtually every cable system in the country. And that is true in the ABSENCE of ANY "must carry" rules. If any inference can be drawn from the filings, especially the APTS filing, it is that broadcasters have

lost all perspective on what these rules are meant to accomplish, and how that can be done with the least dislocation to the public and the least administrative burden, particularly to smaller cable systems.

AREA OF DOMINANT INFLUENCE

CATA will not once again delve into the morass of the "ADI conundrum." The Commission has extensive experience, going back to 1972, when it investigated the appropriate market designations for the purpose of "must carry" and concluded, as the "expert agency," that ADI was not appropriate, created too many unintended consequences for the viewing public and cable operators, and should not be used. Now the Commission is saddled with the problem of making ADI market designations work because they were included in the statute at the behest of broadcasters. There was no hearing, testimony or investigation prior to Congress adopting the ADI designation. There is no legislative background or knowledge of the potential chaos that the ADI designation could cause. That has all been left to the Commission, and the parties have staked their various claims and outlined the problems in detail. It is now up to the Commission to try to make something work that it had rejected once before as not workable.

CATA wishes only to reiterate one thing in this regard: these rules, at their essence, assuming, arguendo, that they are constitutional, are designed not solely to aid broadcasters, but to further the Communications Act goal of aiding the public. Any

rules adopted by the Commission should be viewed through that primary filter: how will they affect the existing viewing public?

One final note on the problem of ADI designations. CATA urges the Commission to recognize that "market" designations do not have to be uniform. For the purposes of "must carry," the "market" can be defined by existing "ADI" counties. For "re-transmission consent," should it be determined that broadcasters may indeed be limited in their ability to grant such consent by other parties, the "market" can be interpreted in a much broader fashion so as to avoid serious dislocation of current television viewing habits. The definitions in this context, are susceptible to being customized to the policy purposes.

RETRANSMISSION CONSENT

Again, the focus of the Commission must be singular: how to make these rules work. The commenting parties have already pointed out that there are essential internal inconsistencies in the way the law was written. Indeed, CATA supports the view, as articulately expanded in the Viacom filing, that retransmission consent requirements should only apply to <u>local</u> signals. This would resolve many of the potential problems. The issue of whether or not the program owners have the power to prevent the granting of retransmission consent is at the heart of the "distant signal" problem. Broadcasters, of course, argue that retransmission consent is solely for the signal, which they control (apparently even outside their licensed area--a notion CATA questions). Most of the cable industry, while wondering

about that interpretation, but fearing havoc in the marketplace, accepts that tortured logic if only as one mechanism to allow these rules to be functional. An alternative, as CATA notes, is to expand the definition of "market" for the purposes of the granting of retransmission consent so that the most likely difficulty, the granting of retransmission consent outside the "ADI" market of the broadcaster, is circumvented for the benefit of viewers.

The NAB, in its comments, seems to miss the point on the problem of distant signal retransmission consent. Maybe it has yet to fully analyze the issue. It seems to focus on the notion that the issue of retransmission consent, particularly outside of the "local" market (in other words, for "distant" signals) is whether copyright holders need to give such consent as well as broadcasters. The NAB, predictably, says no, that retransmission consent is something the broadcaster can grant or not grant and copyrights for the programming is an issue under the compulsory license.

CATA does not disagree with that view, as far as it goes, but NAB misses the point. The issue is whether the program owners or distributors have the power to contractually prevent the broadcasters from granting retransmission consent--even if they want to! If the programmers can, as the Motion Picture Association of America suggests, then it is incumbent on the Commission to adopt the CATA proposal of defining the "market" broadly, to include all those areas that are presently "importing" "distant" signals for their viewing audience. If

that is not done, a simple prohibition by program distributors of the granting of retransmission consent outside the newly designated "ADI" markets will result in the elimination of "distant signal" carriage (except for Superstations) nationwide. We seriously doubt that the resultant constituent outcry is what Congress had in mind. It can be avoided.

SUPERSTATION EXCEPTION

The unique and draconian interpretation of the National Hockey League and the National Basketball Association that the exception to the retransmission consent requirement for satellite delivered superstations only applies to those stations already carried on existing cable systems is totally unsupported by the logic of the rules. Had Congress wanted to simply "grandfather" existing carriage, it could have done so. It did not. Such an interpretation would once again do violence to the viewing public more than any other party. It should be rejected.

PAPERWORK

The Commission, for its own purposes as well as those of cable operators and the public, must seek to make all of these rules as simple and non-bureaucratic as possible. The broadcasters seem to delight, in their comments, in thinking up additional notices, affidavits, separate notifications to the public, etc. that cable operators should provide. CATA simply urges the Commission to recognize these demands in the spirit in which they appear to be made; that the rules are designed for the sole

benefit of broadcasters. They are not. They must be made to work, but that must be accomplished, specifically with regard to smaller cable operators, with a minimum of administrative burden. These rules, despite the comments and demands of the broadcast interests, are supposed to be designed for the public benefit, not for the broadcasters'.

LEAPFROGGING

APTS, in most of its comments, when it was not maligning the intentions of the cable industry, was urging the Commission to read the law as it relates to noncommercial signal carriage very literally. Then, suddenly, it urged an expansive approach when it came to the discretion of the cable operator to select which noncommercial signals to carry should there be an excess of demand. Suddenly APTS found the "intention" of Congress and the "purpose" of the Act to be paramount and, of course, argued that Congress meant to put in a so-called "leapfrogging" rule regarding noncommercial broadcast carriage. APTS can't have it both ways. Such a provision simply is not in the act. It is made up by the same fertile minds that informed us that the defense of constitutional rights proves negative intent with regard to the law. The Commission should reject such self-serving comments out of hand.

CONCLUSION

For the reasons set forth in its Comments and these Reply Comments, the Community Antenna Television Association, Inc.,

urges the Commission to adopt its recommendations and design signal carriage rules that protect cable subscribers served by small cable systems.

Respectfully submitted,

THE COMMUNITY ANTENNA TELEVISION ASSOCIATION, INC.

by: 

Stephen R. Effros
James H. Ewalt
Robert J. Ungar

Community Antenna Television Association, Inc.
3950 Chain Bridge Road
P.O. Box 1005
Fairfax, VA 22030-1005
703/691-8875

January 19, 1993